ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-1002

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 195871.

The Teacher Retirement System (the "system") received an open records request on November 14, 2003, (the "present request") in which it was asked to provide information concerning a request for determination that the system submitted to this office on November 4, 2003, with regard to an open records request made by the same requestor on October 21, 2003 (the "original request"). The present request states, in relevant part:

> 1) Produce all information relating to or concerning Dan Junell's November 4, 2003 'Request for Determination' to the Office of the Attorney [*sic*], including (but not limited to) the faxed acknowledgment he received from the Open Records Division.
>
> 2) Regarding his 'cost estimate' a) yes, we 'prefer to inspect the available records instead or receiving copies b) of the '[o]ther TRS employees', only Michael Green . . . .

You have provided for our review a letter addressed to the requestor and dated December 3, 2003, (the "cost estimate letter") that indicates that some information responsive to the first part of the present request will be made available. *See* Gov't Code

§ 552.303(a) (governmental body may disclose to requestor before the attorney general makes its final determination requested information that is not confidential by law). However, you state that you have withheld portions of the responsive information pending our determination under the act. You further represent in the cost estimate letter that the system maintains no information responsive to the second part of the present request, which you interpret to be a demand for internet searches, websites visited and computer "cookie" files from Michael Green's computer dated April 4, 2003 up to and including October 21, 2003. We note in this regard that the act does not require a governmental body to release information that did not exist when a request for information was receive. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

As a preliminary matter, we note that we ruled on the original request in Open Records Letter No. 2004-0330 (2004), issued January 15, 2004. To the extent the facts and circumstances surrounding the original request have not changed, and to the extent the material submitted as responsive to the present request is identical to the material at issue in Open Records Letter No. 2004-0330, the system may rely on that decision as a previous determination. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations). However, you claim that some or all of the information contained in the exhibits submitted as responsive to the present request is excepted from disclosure under sections 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

You assert that some of the information contained in exhibits 4 and 5 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath,* 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Att'y Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents

the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). You indicate that the draft documents in exhibit 4 relate to a policymaking issue and have been made available to the requestor in final form. You may therefore withhold the drafts that you have marked in exhibit 4 under section 552.111. However, you do not indicate, nor is it apparent to this office, how the documents included in exhibit 5 reflect advice, recommendations, or opinions relating to policymaking decisions for purposes of section 552.111; section 552.111 therefore does not provide a basis to withhold this information.

Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Evidence. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. Upon review of your arguments and the submitted information, however, we find that you have not demonstrated that any of the remaining information contained in exhibit 4 or 5 constitutes work product for purposes of section 552.111.

You also assert that the remaining information in exhibit 4 is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review of your arguments and the submitted information, however, we find that you have not demonstrated that the information at issue in exhibit 4 constitutes or documents a "communication" for purposes of section 552.107. As no other exceptions apply to this information, it must be released to the requestor.

Next, you assert that certain information contained in exhibit 5 is subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records

Decision No. 530 at 5 (1989). Exhibit 5 includes the forms on which the system employees at issue elected to keep certain personal information confidential. These elections were made prior to the date on which the present request for information was made. Therefore, the system must withhold the information that we have marked in exhibit 5 under section 552.117(a)(1).

Finally, you assert that certain information contained in exhibit 3 is subject to section 552.137 of the Government Code. Section 552.137 makes confidential certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body. However, this exception does not apply to an e-mail address that is provided to a governmental body either by a person who has a contractual relationship with the governmental body or on a letterhead, coversheet, printed document, or other document made available to the public. Gov't Code § 552.137(c)(1), (4). The e-mail address at issue is the business e-mail address of an individual who has a contractual relationship with the system and this e-mail address appears on the letterhead of the individual's business. Therefore, the e-mail address may not be withheld under section 552.137.

In summary, the preliminary drafts contained in exhibit 4 may be withheld under section 552.111. We have marked the information in exhibit 5 that must be withheld under section 552.117(a)(1). The remaining information in exhibits 3, 4, and 5 must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: (1) release the public records; (2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or (3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

Steven W Bartels

Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 195871

Enc. Submitted documents

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